Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 12, 1913.

HOLDERS OF TRANSFERABLE CERTIFICATES OF SHARES IN A TRUST ORGANIZED TO CARRY ON BUSINESS.

In Massachusetts, where, for many years, because of difficulty in obtaining charters for private corporations, in certain cases, the plan of certificates, which are transferable as certificates of stock in a corporation, in property the legal title to which is vested in trustees, has been in vogue. It had been argued and held in many cases that the certificate holders were partners, and in one case directly, and in another, *arguendo*, that they were *cestuis que trustent*.

In a decision lately rendered by the Supreme Judicial Court of Massachusetts, again deciding, directly, that the certificate holders in this kind of trust were *cestuis*, the precise line of demarcation is drawn between holders of those certificates who are partners and those who are *cestuis*. Williams *et al.* v. Inhabitants of Milton, 102 N. E. 355.

This line of division is not in one set of certificates representing interests just as do shares of stock in a corporation and transferable in the same way, for all of the cases reviewed by the court were precisely alike in this regard. But the difference is found in whether the property or business in which the certificates represent interests is controlled directly or mediately by the holders, or absolutely by the trustees.

Thus the court, citing the cases on both lines, said the difference "lies in the fact that (in some of them) the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent, who for their convenience holds the title to their property, the property is their property, they are the master; while (in the other) there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders (of this kind) had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in Mayo v. Moritz, 151 Mass. 481, 484, 24 N. E. 1083: 'The scrip holders are *cestuis que trust* and are entitled to their share of the avails of the property when the same is sold' and that is all to which they are entitled." The court cites in support, Makin v. Savings Institution, 23 Me. 350, 41 Am. Dec. 389; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716 and the notable English case of Smith v. Anderson, 15 Ch. D. 247.

This last case is discussed at great length in a recent work, entitled, "Sears on Trust Estates as Business Companies," in which publication it is claimed that there are practically the same advantages in this method of business as by a corporation wherein there is absolute exemption from stockholder liability. There is no such question considered in the Williams case, *supra*, but the result arrived at seems squarely to involve this. Indeed it might be urged, as the publication above mentioned urges, that the trust before the court might have been deemed a partnership for purposes of taxation, as it was not, however, and yet the ancient principle of personal liability of trustee, and not of *cestui que trust*, would govern.

This latest decision of the Massachusetts court has back of it not only an unanimous view, but an opinion strikingly clear, and it suggests to us that, though it be undoubtedly true that stockholder liability may be decreed as a legislature wills, yet it may be unconstitutional to say that no certificate holders shall be exempt, where the trustee is the absolute master of property he manages for their benefit. Such an arrangement seems plainly within the compass of lawful contract, provided it violates no rule against perpetuities or unlawful suspension of alienation. One would have to think ill of our equity jurisprudence to suppose that

private rights could not be as well guarded by such a plan as by resort to a corporate agency.

This plan brings to mind the Mississippi bubble and other exploitation of fabulous riches in America in pre-revolution days, but, as we remember, the trustees were figure heads and the certificate holders were the managers and controllers of the schemes that scandalized England very much as bogus capitalization of corporations has scandalized America. But the ancient principle of trustee accountability—the highest form of responsibility known to the law—suffered no detriment therefrom.

Now under modern conditions personal responsibility can be and is covered by indemnity insurance, and, additionally, these trust arrangements may be suited to whatever purpose may be in view and discretion be as confined or as broad as organizers and investors may desire. The court points out, however, with great explicitness, that the trustees must be the masters, under the trust instrument, with the certificate holders entitled to the avails of management, and to distribution upon the termination of the trust.

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY—SLANDER AS WILLFUL AND MALICIOUS INJURY BARRING DISCHARGE.—The Maryland Court of Appeals holds that the clause of the bankrupt act exempting from discharge judgments "for willful and malicious injuries to person or property" includes a judgment for slander, because an essential element of every slander is that it is maliciously uttered and injury to reputation is an injury to person. Parker v. Bratton, 7 Atl. 756.

Similarly it was so held by the Supreme Court of South Dakota, but a judgment against plaintiff in slander, for costs, is not within the exception. Drake v. Vernon, 128 N. W. 317.

We doubt very greatly whether such an injury as slander comes within the contemplation of such an exception, though libel or malicious prosecution might. We understand the law to be, or at least it has been so held in some jurisdictions, that slander or an oral defamation does not make a corporation liable, nor a partnership, though libel may. If this distinction is just, then to make the exception embrace slander would be to place bankrupt corporations and partnerships on a different footing than individuals, when the exception means to apply to all bankrupts alike. Bringing "person and property" together this way seems to justify the thought that tangible or physical injury was meant, especially as it so easily could have been stated that "person" also meant reputation. Exceptions ordinarily include no more than is plainly expressed.

NAVIGABLE WATERS—CHANGE OF CHANNEL BY IMPROVING NAVIGATION AS AFFECTING RIPARIAN RIGHTS.—A question before Eighth Circuit Court of Appeals, in a recent case, was whether a change in the channel of a navigable stream—moving it greatly from where it was before—caused by rightful exercise of national power, was, in its effect on riparian ownership, to be considered under the rule of avulsion or of erosion. Whiteside v. Norton, 205 Fed. 5.

Incidentally in this case state boundaries were considered, as the stream whose channel was changed was the boundary line between two states. Erosion and accretion both fall under the same rule and mean the slow processes of change, which take from riparian ownership and add to it on the other, or do perhaps only one of these things. But avulsion is where a stream, which is a boundary, from any cause, "suddenly abandons its old and seeks a new bed." It was said: "The boundary remains as it was, in the center of the old channel, although no water may be flowing therein," quoting from Missouri v. Nebraska, 196 U. S. 23, 49 L. ed. 372.

Pointing out that neither congress nor an administrative department of the government has power to change boundary lines between states, nor take away riparian rights, it was deduced that though these rights were subject to the national right to improve navigation, yet this human or governmental agency was more akin to avulsion, in its broad sense, than to erosion or accretion.

By analogy we are carried rather to the former than to the latter, but where i. e., how far up or down or up and down the stream either

avulsion or that which is here akin to it should be recognized instead of erosion or accretion might be very doubtful. Avulsion is not wholly unanticipated and it can cause other boundaries by slow erosion or accretion, and the influence of improvement of navigation being also anticipated, because all riparian rights are subject to its possible exercise, may do the same thing. So what is sudden and what gradual change may be referable very greatly to surrounding circumstances.

LIBEL AND SLANDER—PUBLISHING REPORTS OF OFFICIALS AS PRIVILEGED.—Schwarz Bros. Co. v. Evening News Pub. Co. 87 Atl. 148, decided by New Jersey Supreme Court was an action for libel in a newspaper publishing a report made by officials in due course of duty, containing damaging matter as to the business of a slaughter house for live horses for export to Holland. There was a plea of privilege.

The court said: "It is settled that the publication of fair reports of judicial proceedings are absolutely privileged, as are fair reports of debates in legislative bodies; but even this exception to the general rule of liability for defamatory statements is of recent development, and it has never been extended to reports of public officials, which, however privileged they may be when made to persons charged with the duty of enforcing the law, are not of such character that they may be spread broadcast to the world on the authority of a newspaper, without the newspaper being liable for damages in case the statements are false."

This is a very salutary ruling, even, if the law were so reckless, so to speak, as to cause such reports to be filed and subject to inspection by the public. There would be no surer way for a malicious official to work private revenge upon another than to file a false report under cover of a privileged communication, and even if he were honest, his ex parte investigation ought not be heralded abroad under claim by the public press that it is assisting in protecting the public health or morals. At bottom the animus is to get news and the more sensational it is the more is this animus quickened. It is bad enough that a petition or an answer containing libellous matter should be published under privilege, and the court is right to view this "recent development" with as little favor as possible.

SOME OBSERVATIONS ON PLEADING AND PRACTICE.

Common law pleading is very frequently described as being a much more scientific system of pleading than our modern practice. This, of course, is literally true, but it is true only because modern pleading is something which is quite devoid of science. But while fully meriting the praise bestowed upon it, it cannot be said that common law pleading as a whole had much to commend it. There was far more form than substance. The system was evolved by the common law judges after a long experience, but it was the case in times past as it is to-day that a practice built up on adjudged cases is unwieldy and ineffective. To-day pleading and practice are to be regarded as mere incidents to the litigation and so treated. But while pleading, in particular, is a mere incident, it is a most important incident, and its rules and purposes should be kept clearly in mind. The rules are few, and are well understood, but judging from the average complaint and answer one sees to-day, it is evident that its purposes are not clearly comprehended. Therefore it may not be amiss to draw attention to the object of pleading and of the work it is designed to accomplish, having regard more to what the law should be than what it is, for it is painfully evident that the courts are responsible for much of the confusion of thought in this branch of the law.

Whenever a dispute arises between two individuals, the question whether or not a court will take cognizance of the case depends altogether on whether or not one of the parties has committed a legal wrong against the other. If he has, then (and only then) the party wronged will be in possession of facts constituting a cause of action; facts which on analysis, will resolve themselves into a few general elemental facts on the one hand, and many particulars thereof on the other. And the question whether or not both these general and particular facts should be set forth in the pleading will depend altogether upon

the purposes of a complaint. Some, and perhaps most, of the general facts constituting plaintiff's case may be admitted by the defendant, and such admissions at once eliminate from the controversy the facts so admitted. The pleadings are then accomplishing one of their designed purposes, namely, that of ascertaining what facts are, and what are not in dispute. A trial is had for the purpose of deciding disputed facts, and should it appear from the pleadings that there are no facts in dispute, there would of course be no occasion for a trial. Therefore, one of the prime objects of pleading is to sift out the allegations and ascertain just what facts, if any, are actually in dispute; and any given system of pleading is good or bad according as it affects or fails to affect this purpose.

Assuming then the plaintiff to have a cause of action, the first thing to bear in mind in drafting a complaint, will be to state the facts in such a way that the defendant, in answering, will be obliged to admit those over which there is no dispute. This, of course, is very readily accomplished by stating the separate facts in short paragraphs, instead of in one long one, containing several disconnected facts, the latter being a way which certainly has more style to it, but one which invariably invites a denial in toto. Having thus attended to his own requirements, the pleader should now have eye to the other great purpose of a complaint, namely, that of apprising his adversary of all the facts constituting the cause of action, so that the latter may prepare to disprove them at the trial. And the first question that arises is, is a defendant justly entitled to notice of all the particular, as well as the general facts. Now in theory he is, but in actual practice, he is not. In order to expedite matters it is necessary that a certain amount of brevity be indulged in, and that only the general elemental facts constituting the cause of action be pleaded, this because it is invariably the case that but one or two of the general facts constituting the cause of action are in dispute. And as to those not in dispute, the only restriction is that they be described in language sufficient to clearly identify them so that all facts making up the cause of action will be res adjudicata after a hearing. As to those allegations, however, that will be controverted, all the particular facts, speaking generally, should be pleaded, although it may well be that by stating the elemental facts only, the complaint will not be demurrable. Complaints, however, (and this should be written in large letters) have other purposes than merely stating a good cause of action. If they do as much as this, all that can be said is that plaintiff has some good facts; but in stating these facts, plaintiff must have in mind the two great purposes of the pleading as above stated.

In actual practice a plaintiff knows perfectly well which of his allegations will be controverted and which will not (or should not); and as to the former, it will be sufficient to plead the general elemental facts only; but as to those which will be controverted it is essential to append thereto a statement of particulars. There are, of course, exceptions, such as where defendant himself is in a position to know more about the facts than plaintiff, but as a general rule, defendant is entitled to notice of all the particular facts going to make up any general allegation that is in issue, and this for the simple reason that to intelligently prepare for trial, either party should be apprised of what he has to meet. It is the undoubted right of the defendant to be fully informed of just what he will be called on to disprove, and it would be well if pleaders would recognize this fact and cultivate the habit of alleging the disputed facts—i. e., such as are expected to be disputed—with more particularity, rather than wait for the defendant to call for a bill of particulars.

But there is still another reason for requiring a full statement of facts. It frequently happens that a plaintiff has in fact no cause of action, though this may not be evident from an inspection of the complaint owing to the generality of the allegations.

Defendant may know that no cause of action exists, but cannot demur to the complaint as it stands. Plaintiff, on the other hand, may think he has a good cause of action, and then again he may not. In either case the defendant should be in a position to require a further statement of particulars in order to bring this fact into prominence, and thus render the complaint demurrable. To illustrate: In an action on a promissory note it is unnecessary to allege a consideration in the complaint, consideration being presumed. Nevertheless, if the consideration relied on, is in fact an illegal one, or is insufficient in law, the statement of this fact in the complaint would, in a proper case, end the matter, for the complaint then would not be stating a cause of action.[1] An ideal system of practice would provide a method of ascertaining all such preliminary facts with the least possible expenditure of effort.

When all else fails, either party should, as a matter of course, be permitted to interrogate the other for the purpose of bringing to light such evidentiary facts as may be within their knowledge and as are not uncovered by the pleadings. An examination of the parties will frequently disclose the existence of bad faith. Supposing in the case just cited the plaintiff to be an indorsee and a second defense to the action that plaintiff is not a holder in due course. Now the question of consideration has been disposed of, but there still remains the status of plaintiff. It might be that a full statement of particulars would settle his fact also adversely to plaintiff, and again it might not. Consider then the effect of his being catechised along these lines: Did you receive this note from the payee in the regular course of business, for value, and without notice of any infirmity? *Ans.* Yes. What value did you give for it? *Ans.* It was in payment of an old debt. When was this old debt contracted? *Ans.* Oh, about ten or fifteen years ago. Where does the payee of this note reside? *Ans.* 401 Chestnut Street. Where do you reside? *Ans.* Same place. Is the payee any relation to you? *Ans.* He is my brother-in-law, and so on. In fact, here is an action that has no right to a place on the court calendars, for there are no disputed facts to determine. The plaintiff knows he has no case, and he should be compelled to admit it. If our practice provided for a more effective means of getting all the conceded facts incorporated into the legal statement of the case, trial tribunals would be relieved of much unnecessary work, and cases which at present go on the calendars would not get there at all.

Examinations before trial at present are so hedged in by judicial precedent that this effective remedy is shorn of much of its usefulness. The old equity cases on discovery weigh heavily upon it. These examinations in order to work justice, should be granted as a matter of course, and each party fully interrogated as to his knowledge of the case. The remedy by bill of particulars and examinations before trial, are both excellent devices for clarifying the issues preparatory to trial. The bill of particulars is by its nature more of a summary process than the other, but the examination may be employed where further particulars prove insufficient. The one should supplement the other. Perhaps in nine cases out of ten the statement of particulars will suffice without resorting to the examination. The important point is that either party should have at his disposal a remedy by which he may effectively probe the other for such facts as are in his possession. It would seem that the practice to-day in the English and Canadian courts is very liberal in this regard, either party being allowed, as a matter of course, to fully interrogate the other as to such facts as are relevant to the issues.

The rules of pleading are familiar and are well understood. Facts and not conclusions, must be pleaded. Proof is con-

(1) Present practice invariably excludes this allegation from the complaint. It is considered to be a separate defense and as such is to be set up in the answer. This, however, is not saying much for present practice.

fined to the scope of the allegations, and plaintiff cannot plead a tort and prove a contract, and vice versa. The defendant must avoid pleading in the form of a negative pregnant, and where the complaint alleges facts conjunctively, the answer should deny them disjunctively, and so on. With such rules in mind, a pleader should set forth his constituent facts in as many separate paragraphs as will insure an admission of all such as he believes should be admitted. He should then cultivate the habit of alleging the particulars of such allegations as he deems will be controverted. Nothing is to be lost by a friendly spirit being embodied in the pleadings and much is to be gained. By thus stating the allegations distinctly, and amending and reamending the complaint, if necessary, the facts that are not in dispute will be quickly eliminated. In the meantime the defendant will possibly have called for more particulars, and both parties will, if necessary, have examined the other as to essential evidentiary facts, and the real issues of the case will be ready for a jury.

Not much can be said on the question of pleading a cause of action arising in another jurisdiction. The rule at present is confusing and depends altogether on the presumption indulged in by the state where the action is brought. It may presume that the common law is law in the other state, or it may presume it to be the same as the law of the forum. Again, it may indulge in no presumption if the foreign state is not a common law state or where the domestic law is of statutory origin. In any of these cases the foreign law may be different, and this difference may be the basis of plaintiff's or defendant's case. It should be pleaded then as a fact. Sometimes the foreign law is said to be a matter of evidence only, to be proved but not pleaded. This distinction, however, is a poor one, and has nothing to support it. A rule requiring the foreign law in all such cases to be pleaded as a fact on penalty of the complaint (or answer as the case may be) being demurrable would be productive of much good. It is not proper that the adverse party in such cases should be left to speculate on what the other side may spring on him in the way of legal subtleties of another state. His attorney is supposed to take care of the law of his own state, but the latter's opinion on the law of another state is apt to be anything from good to bad. The simple expedient of requiring the pleader in all cases to allege the foreign law as a fact would prevent surprise to the adversary and would give the adverse attorney an opportunity to deal intelligently with the foreign law.

Now a word in regard to separate defenses. It may be stated that facts which go to make up a defense are not part of plaintiff's case, as for instance the defense of bankruptcy, infancy and payment. This is simply a rule of common sense and convenience and should be adhered to more closely than it is. A defense has no place in the complaint. Conversely, a defendant should not set forth a defense in his answer unless the law expressly requires it, for the rule is supposed to be that the burden of proving a defense is on defendant. The law, however, is not consistent. One of the most pretentious and lawyer-like allegations occurring in practice, is that which describes the plaintiff or defendant as being a corporation. Of course, this allegation, properly speaking, should not appear in the complaint at all, but should be pleaded as a defense.[2] Similarly, in an action on a promissory note, the fact that the plaintiff is not a holder in due course, is invariably pleaded as a defense, and by the rules of pleading the burden of proof would be on defendant, whereas, in fact, this is part of plaintiff's case and the bur-

(2) The New York Code stultifies itself when it provides (Sec. 1776) that "in an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant as the case may be, is not a corporation." The preceding section provides that the complaint must aver that plaintiff or defendant as the case may be is a corporation.

den is on him.[3] This allegation, no doubt, appears as a defense for the reason that a cause of action on a note is fully stated without it. It only becomes part of plaintiff's case after a personal defense to the note (such as no consideration) has been interposed. According to the substantive law of bills and notes a presumption of consideration operates in favor of plaintiff, and this fact, therefore, is properly enough pleaded as a defense. But as to the former, the rules of pleading require, (it being a part of plaintiff's case), that it should appear in the complaint. Therefore, it is submitted that the practice should be, in a case like this, to amend the complaint, and insert the necessary allegations therein. This would be pleading according to principle, and here again plaintiff would be conferring a benefit on all concerned by stating these facts to begin with. No one's feelings would be hurt by this piece of generosity.

Now the foregoing suggestions will look rather meek when viewed in the light of rusty methods of procedure. Court procedure at present is not only rusty; it is a wreck. The judicial machinery is altogether out of plumb. To-day when an attorney has to make a motion to correct a pleading, he hesitates a long while before he does it, because it involves so much disagreeable work. He must go to court armed with authorities and precedents on the most trivial questions of practice, otherwise his opponent will beat him with costs. Better let it go and take a chance on it. Digging out authorities on serious questions of substantive law is not as agreeable sometimes as it might be, but on trivial questions of practice it is unbearable and wholly unnecessary.

In discussing the question of procedural reform, it is commonly assumed that the chaotic condition of things is due solely to a lack of initiative among lawyers; even members of the profession anxious for reform look at it in this way. It is the emphatic opinion of the writer, however, that such is not the case. Lawyers no more than engineers or other professional men, are willing to struggle along with an antiquated and cumbersome method simply because they delight in technicalities. The present state of affairs continues because they are not at liberty to act in the premises. If all the lawyers in the United States were to get together and revise the rules of procedure into a Code Ideal, it would accomplish no good, for the legislature would have nothing to do with it, and even if the legislature did, the courts would soon construe it out of all recognition.

Now the fact that the courts manage to create such a mess is not by any means a reflection on the courts. They are simply attempting to apply the mandate of the legislature to a case where it will not apply. Something must apply—hence the decisions. In the preface to his recent work on Rules of Pleading, Mr. H. B. Bradbury states the case thus: "From past experiences we have learned that a statute relative to practice may mean what it seems to us to mean, or it may mean something entirely different, as construed by the courts. So after reading the code section we invariably go to the annotations and latest table of the code citations to secure the judicial interpretation. Every little while after a section of the code is construed to mean something which the legislature decides it was not intended to mean, an amendment is passed which destroys the force of the decisions. Nevertheless, these decisions are still carried as annotations to the various sections of the code, and one who is not familiar with the history of a particular section becomes confused at the apparent conflict between the statute and the decisions cited under it. Not infrequently it takes hours of patient research to run down the cases and discover the true rule to be followed on a simple question of practice.

(3) "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."—Section 98 of the New York Negotiable Instruments Law.

The time lost in this way by both judges and lawyers is incalculable." The whole trouble is this. Court procedure is a matter of exceptional detail and is a topic with which experts only are conversant and are competent to deal. The most expert body of men in the state for this purpose are, obviously, the judiciary. Let the judiciary then devise and enact its own rules of procedure. When the legislature enacts a rule, that rule becomes forever fixed and unalterable. A natural inertia prevents its amendment to meet the exigencies of practice, and there, of course, follows appeals to the courts for interpretation, again followed possibly by a belated amendment which results in the state of affairs above related to. The courts and the legislature pull in opposite directions, and it is quite evident that their joint efforts are not productive of much good.

Section 793 of the New York Code of Civil Procedure is illustrative of this sort of thing, and merits notice. Sections 791-2-3 relate to preferred causes, and taken together are conspicuous examples of code English. Near the end of this long drawn-out section occurs this sentence: "And if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at or for the term for which the application is made, the court or justice *must* designate a day certain during that term on which day the said cause shall then be heard." The writer once got into quite a stew over this section because the few decisions he read, deliberately construed this plain and emphatic "must" into "may." This seemed like utter heresy. Nevertheless, not being inclined to let such "bad law" pass unnoticed, he prepared to go to the bottom of the matter, and accordingly spent a considerable part of the day reading cases, until finally the joker was found hidden in one decision that in the hurry had been overlooked. This decision held that the word "must" was unconstitutional, and that the legislature *must* have meant "may" instead of "must." Of course, the legislature meant no such thing, but that made no difference. The edifying feature of the case, however, is that the section still reads "must" but it means "may," so beware of it.[4]

Rules of practice are designed to carry into effect existing law. An effective code of procedure requires for its construction a vast knowledge of detail such as is born only of close experience. It requires, too, that the existing rules be susceptible of easy change, in order that they shall be responsive to the demands of practice. Legislature-made rules are neither. But once confer full authority on the Judiciary to enact its own code of procedure and all the lawyers in the state or country would manifest enthusiasm over the prospects; and a topic which for centuries has been a cause of annoyance would become a cause for joy. There would actually come into being a likeable Code of Procedure.

It goes without saying that judicial proceedings should be greatly simplified. Applications to amend pleadings and the like should be made in an informal manner to a judge whose decision should be given at once, without the citation of any authority other than the Rules of Practice, and without right of appeal. Here is one cause of trouble. There is too much form and precedent. The authority that passes on points of procedure should be summary and final. A pleading may need to be amended or stricken out, but there are so many ropes to pull to accomplish this end that the game isn't worth the candle. Take an example: one of the rules of pleading is that certain facts are implied and need not be specifically alleged, as where plaintiff states that he is

(4) Prior to the year 1904, the section read "may." In that year, however, the legislature changed this "may" into "must." The decison referred to, Riglander v. Star Co., 98 App. Div. (N. Y.) 101, holds out strongly for "Home Rule," for it indignantly says: "The courts are not the puppets of the Legislature. They are an independent branch of the government." This decision comes from the Appellate Division, First Department. Perhaps the section means what it says in the rest of the state. At any rate, it is a typical practice case. Here are ten whole pages of opinion devoted solely to must and may.

the owner and holder of a note. The fact that he is the lawful holder is implied. Nevertheless disproof of that very fact may be the whole of defendant's case, and he accordingly will either deny the whole allegation as it stands or he will set that fact forth as a defense. Properly the pleading should be amended so as to state these facts separately, and thereby narrow the issues, for such a fact is part of plaintiff's case. Neither party, however, would take the trouble to do this. It takes too much time. In New York City, for instance, a motion of this kind is a day's work. Formal affidavit and notice of motion and memorandum of authorities have to be prepared, and the notice served with all due formality—five days' notice is required unless shortened by order to show cause; case put on motion calendar; sit a couple of hours in court waiting your turn; followed by long argument pro and con. Decision reserved—appears in the Law Journal a week later.

Now contrast this practice with what it might be. Attorney A calls up Attorney B on the telephone and requests an amendment of his complaint. B objects and A requests him to appear before the judge at Chambers a few hours hence. B agrees to this because he knows that if he demands a more formal notice the judge may make him pay a few dollars costs. B cannot say that he must look up the authorities because no authorities other than common sense are allowed on the argument, and each attorney carries (or should carry) this attribute in his head. The judge listens to the respective contentions and orders accordingly, and the matter is concluded.

Such an energetic and effective procedure is not a mere chimera by any means, but is, on the contrary, within easy reach. It simply calls for recognition of the following truths: *First.* The entire field of adjective law, saving such fundamental rules as could be embodied in a short practice act, should be enacted by and be under the effective control of the judiciary instead of the legislature. *Second.* The rules as enacted should give the individual judge administering them large discretionary powers. *Third.* There should be no appeal from his decision. As to the first of these, all that need be said is that the evidence shows conclusively that the legislature has made a most horrible failure in matters of procedure. The only competent body to legislate on this topic is the judiciary. As a department of the government they are qualified to enact rules of practice for the courts; and close experience with the working of litigation constitues each member thereof an expert on this question. The present method of legislature-made rules results in a practice founded on case-law which culminates in the existing order of things. A practice which relies on adjudged cases for working out the details thereof is, at its best, a complicated one, and costly beyond all understanding. One look at the many volumes devoted to practice cases is enough; or the Cyclopedias of Pleading and Practice. These bulky tomes are full of disconnected utterances of courts which seem altogether wanting in principle. The subjects dealt with are such as require experience and common sense in their application, rather than deep reasoning. To extract reasoning from practice cases is a hard task.

As to the second proposition it is submitted that the opinion of an experienced judge on a concrete question of practice (i. e.—Whether or not or how the enacted rules of practice apply in a particular case) is worth vastly more than the longest brief of authorities ever written, not to mention the fact that it will expedite cases wonderfully. A liberal amount of discretion reposed in the judge administering the practice rules would result in injecting into procedure a life that is entirely wanting at present. And as to the third proposition, convenience simply demands that on these every-day matters of practice the final arbiter should be the judge of first instance, saving, however, a right of appeal in that ill-defined class of cases that might be described as malicious abuse of discretion.

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East Orange, N. J.

PHYSICIANS AND SURGEONS—MALPRACTICE AS A TORT.

FINCH v. BURSHEIM.

Supreme Court of Minnesota, June 20, 1913.

142 N. W. 143.

An action against a physician and surgeon to recover damages due to negligent and unskillful treatment of plaintiff is based on a breach of his contract to treat the plaintiff with ordinary professional skill and care, and is an action on contract.

BUNN, J.: Appeal from an order overruling a demurrer to the complaint. Two questions are here for decision: (1) Does the complaint state a cause of action? (2) Does it show that the right of action is barred by the statutes of limitation?

The complaint alleges that on February 28, 1909, plaintiff employed defendant, a duly licensed and practicing physician and surgeon "to set, adjust, care for, and heal" a dislocated hip joint from which plaintiff was then suffering; that defendant "undertook to set, adjust, care for, and heal said joint"; that defendant negligently and unskillfully conducted himself in the treatment of said injury, and failed to adjust, set, or care for said joint, whereby the ligaments and muscles surrounding said joint became inflamed, weakened, and diseased, so as to become very painful to plaintiff, and make her a cripple for life. General damages in the sum of $5,000 are alleged, and special damages pleaded.

(1) 1. The allegation that defendant "negligently and unskillfully" treated the injury after undertaking the case is clearly sufficient as against a demurrer. Perhaps a motion to make the complaint more definite and certain might have been sustained; but it is hardly open to serious question that the complaint states a cause of action, and we so hold.

(2) 2. Defendant contends that the right of action is barred by R. L. 1905 § 4078 subd. 1, which provides that: "The following actions shall be commenced within two years: 1. For libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury. The construction placed upon this subdivision in Brown v. Village of Heron Lake, 67 Minn. 146, 69 N. W. 710, and Ott v. Great Northern Ry. Co., 70 Minn. 50, 72 N. W. 833, disposes of the contention that the cause of action stated in the complaint is within this subdivision, even conceding the action to be one in tort.

But the cause of action pleaded in this complaint is one on contract. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55. It could not be maintained without pleading and proving the contract. The complaint here does plead the contract, by alleging that plaintiff employed the defendant to set and care for the joint, and that he undertook to do so. The six-year limitation applicable to actions upon contracts applies.

Order affirmed.

NOTE.—*Action Against Physician and Surgeon for Negligent Treatment in Tort or Contract.*—The instant case seems opposed to the great weight of authority in ruling, in effect, that such an action is necessarily *ex contractu*, and that allusion to the contract is what might be called pleading it as a basis of the action. But it would seem that the action was not necessarily barred, as there was option to sue either in tort or contract and the latter might save it. Whether in code pleading this petition, though sounding in tort, could not be amended so as to sound in contract seems a doubtful question. We refer to a number of cases to show the instant case in error in saying, or seeming to say, the action must be in contract.

In Hales v. Raines, 162 Mo. App. 46, 141 S. W. 917, it was said, in answer to a claim of assumption of risk by a patient that: "It is argued that the suit proceeds *ex contractu*, and therefore this evidence was competent as tending to reveal what was the true contract of the parties touching the use of the X-ray. It was true the petition avers that plaintiff 'employed defendant for a reasonable compensation to be paid therefor * * * to treat plaintiff's right hand for eczema,' but this does not render the suit one in contract, for such averment concerns only matter of inducement pertaining to the relation of the parties, in which the law implies and annexes to defendant's calling of a physician and surgeon when he undertakes to serves persons in that capacity. In those cases where the law raises out of the contract of employment a duty which it annexes to the calling, as here, and the allegation is that such duty was negligently and carelessly breached, the courts declare the petition to proceed as in tort and treat the reference in the prior averment touching the contract of employment as mere inducement. (See Canady v. United Rys. Co., 134 Mo. App. 282, 114 S. W. 88). Obviously the present suit proceeds as for the injury to plaintiff through the omission of defendant to exercise ordinary care and skill in the treatment and in no sense as for a breach of the contract of employment."

This case first came on appeal before Springfield, Mo., Court of Appeals (130 S. W. 425), but went to St. Louis Court of Appeals because transferred to the former court without authority of law. The opinion rendered by the Springfield court took the same view above announced, citing Cooley on Torts, p. 90; West v. Martin, 31 Mo. 375, 80 Am. Dec. 107; Robertson v.

Wenger, 131 Mo. App. 224, 110 Mo. App. 224, 110 S. W. 663; Ghere v. Zey, 128 Mo. App. 362, 107 S. W. 418; Whitsell v. Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830; Dorris v. Warford, 124 Ky. 768, 100 S. W. 312, 9 L. R. A. (N. S.) 1090, which are said to support the proposition that the employment of a physician and surgeon merely requires him to exercise that degree of knowledge and skill and care which physicians and surgeons practicing in the same locality ordinarily possess. From this is deduced the principle that any abatement from this standard is negligence or tort.

In Randolph v. Snyder, 139 Ky. 159, 129 S. W. 562, it was said, as to a physician who was employed by the year, that: "If the defendant made a contract with the plaintiff to treat him and his family, and simply broke the contract by refusing to come when sent for, or to undertake the case, the right of action would be simply for the breach of the contract and there would be no right of action in tort. But if the physician came and undertook the case, and having undertaken it, was negligent in his treatment, then a cause of action in tort may be maintained for the nonperformance of the duty which the law cast upon him when he undertook to treat the case. The rule has often been applied in the case of innkeepers, carriers, attorneys, physicians, etc. They all rest upon the same ground. See Cooley on Torts (1st Ed.) 638, 639."

In Mullin v. Flanders, 73 Vt. 95, 50 Atl. 813, there was alleged consultation, retention and employment of the physician and his undertaking to use reasonable care, skill, etc., and his negligence and unskillfulness, etc. It was said these averments show the action to be a breach of duty without reference to the contract under which a contract to operate was undertaken. This was held to state an action in case and not assumpsit.

In Harrod v. Bisson, 48 Ind. App. 549, 93 N. E. 1093, a suit was alleged to be based on tort where "there is no allegation of a promise on the part of (defendant) and the mere fact that (plaintiff) alleges that she employed (defendant) for a certain reward is not controlling, where the other averments of the complaint show conclusively that recovery is sought for injury and damages resulting from the careless, negligent and unskillful treatment by (defendant)." There are cited Globe v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; Boor v. Lowrey, 103 Ind. 468, 53 Am. Rep. 519; De Hart v. Houn, 126 Ind. 378.

In Palmer v. Jackson, 62 Fla. 249, 57 So. 240, it was said: "The declaration alleges that the defendant did undertake the treatment of the plaintiff; and that it was the duty of defendant as physician to properly and skillfully treat the plaintiff; but the defendant did so carelessly, negligently and unskillfully treat the plaintiff that he was thereby injured. These allegations are applicable to a tort growing out of a contract and they do not exclude the existence of an express or implied verbal contract relation between the parties which is usual in such cases."

In Carpenter v. Walker, 170 Ala. 459, 54 So. 60, a plea in abatement was filed, which challenged the venue upon the ground of the action being *ex contractu* conceded to be good under local statute, if well based. The court said: "All the obligations as to a contract are mere matters of inducement and to show the relations between the parties and to show there was a breach of duty owing by the defendant to the plaintiff, based upon a growing out of the contractual relations between the parties. The gravamen of the action in each count is clearly the breach of this duty owing by the defendant to the plaintiff and not a mere breach of the contract itself. The action against a physician for malpractice need not be based upon a contract, though it may be and usually is. It is sufficient if based upon his legal obligation. The action for malpractice is essentially in tort and hence it is immaterial by whom the physician is employed, citing Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900. While a physician or surgeon may under the same state of facts be liable both *ex contractu* and *ex delicto*, yet the plaintiff has the option to declare against him in either form."

C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT AMERCAN BAR ASSOCIATION MEETING AT MONTREAL.

(By a Staff Correspondent.)

The meeting of the American Bar Association, held in Montreal, Canada, September 1, 2 and 3, has no equal, and will probably never be excelled in historic and social interest and important business accomplished.

All records were broken in an attendance of nearly 1500 members, in the election of an ex-President of the United States, Hon. William Howard Taft, as President of the Association. It set a high standard even for this great and historic body.

Upon his election as president in 1912, Frank B. Kellogg set about perfecting a program, in which efforts he called to his help three great nations—England, France and Canada. England sent her Lord High Chancellor, the Right Honorable Viscount Haldane, who spoke upon the subject of "Higher Nationality—a Study in Law and Ethics." The address dealt with nations, but the principles are applicable to private walks of life. The Lord High Chancellor's voice, while low, reached the entire theater. His pleasing Irish countenance and his demonstrative manner guaranteed to him a welcome reception, and made for him innumerable personal friends. The Keeper of the King's Seal became once more the lawyer, which enabled him to fraternize with freedom. France sent Maitre F. Labori, her greatest advocate. An accident prevented his participation in many of the events, but upon those who had the good fortune to meet him personally he made a lasting im-

pression. Canada participated through her prime minister, Hon. Robert L. Borden, and her Minister of Justice and Attorney General, Hon. Chas. J. Doherty. From Washington came the Chief Justice of the United States, Hon. Edward Douglass White, who introduced the Lord High Chancellor. The address of Chief Justice White was exceedingly happy in expression, though dignified and impressive. His reception by the audience of lawyers must have been deeply gratifying to the distinguished jurist. There also came from Washington the Attorney-General, Hon. J. C. McReynolds, who delivered an address to the "Conference of Judges," hereafter to be mentioned. The critical audience of Chief Justices temporarily put aside its reservation in order to make known its hearty approval of the nation's first lawyer. He promised the support of the administration in behalf of the campaign for uniform judicial procedure.

The Business.—The first work of the meeting was the "Conference of Judges," held Saturday night, August 30th, and concluding Tuesday afternoon, September 2nd, when a permanent organization was completed. The conference, conceived by Thomas W. Shelton, chairman of the committee on Uniform Judicial Procedure, was made up of the Chief Judge of the Highest Court of each State, the senior judge of the nine Federal Circuit Courts of Appeal, the Chief Justice of the District of Columbia, and a Federal Judge from Porto Rica and Hawaii. The meeting was called to order in an address by Chairman Shelton. The Conference of Judges in the future will be known as the "Judicial Section" and as such will become a permanent feature, having been made so by a vote of the Bar Association. Its object is to bring about closer relation with the courts and the states looking to uniformity of procedure and fixed interstate judicial relations. The Association was called together Monday morning by President Frank B. Kellogg, who delivered his address on "Treaty Making Power." It was a profound and eloquent discussion based largely upon the recent California-Japan situation, taking the position that treaties took precedence over state laws. Tuesday afternoon was taken up with Lord Haldane's address and the conferring of honorary degrees by McGuill University upon the Lord High Chancellor, Chief Justice White, Prime Minister Borden, Maitre Labori, Ex-President Taft, Chief Justice Doherty, Minister of Justice of Canada, Hon. Joseph H. Choate, Hon. Frank B. Kellogg, Hon. Elihu Root, the latter of whom not being present. Tuesday afternoon was taken up with reports of committees, none of which invoked discussion except that on Commercial Law, Patent, Trade-Mark and Copyright Law and Uniform Judicial Procedure. All of these received the endorsement of the Bar Association. The custom of Secretary George Whitelock is to print and distribute the reports of the committees two weeks in advance of the meeting so that the members are thoroughly conversant with the business in hand. The feature Tuesday morning was the address of Ex-President Taft on "The Tenure of Judges." It was enthusiastically received though it went to the very heart of the troubled question of judicial tenure. It ought to be printed and placed into the hands of both lawyers and laymen. Wednesday morning was taken up with a symposium on "Struggle for Simplification of Legal Procedure." Federal Judge William C. Hook was almost dramatic in his simplicity and clearness in discussing "Some Causes." Judge N. Charles Burke of Maryland, under the head of "Legal Procedure and Social Unrest," went into a very general discussion of causes of unrest. Hon. Wm. A. Blount, of Florida, practically, succinctly and at times very eloquently pointed out the remedy under the title of "The Goal and Its Attainment." The addresses of Judge Hook and Judge Blount are companion pieces and should be printed together. The following Canadian lawyers were elected honorary members of the American Bar Association: Premier R. L. Borden, Sir Wilfred Laurier, Lieut.-Governor Lauglier, Chief Justice Doherty, Sir Lomer Gouin, Sir Charles Fitpzatrick, Sir Charles P. Davidson, Horace Archanbault, Michael Mathieu, Dean of Laval College; F. P. Waldron, Dean of McGuill University; Mayor Lavalee, J. E. Martin, K. C., and R. C. Smith, K. C. Maitre Labori of Paris was also elected an honorary member.

Social.—The social features are not likely to be excelled for years to come, under the able management of Hon. R. G. Smith, K. C., of the Montreal Bar. While the members in general were kept going, the visiting judges were accorded unusual consideration. The Lord Chief Justice received the judges at the Hunt Club, Sunday afternoon, where opportunity was had to meet the Lord High Chancellor, Mr. Chief Justice White, the Attorney-General of the United States, the Attorney-General of Canada and other distinguished guests. Sunday evening, President Frank B. Kellogg gave a dinner for Lord Haldane at the

Ritz-Carlton. Monday evening a magnificent appointed dinner was given for Lord Haldane at the Ritz-Carlton, by the Minister of Justice of Canada, at which there were present about one hundred and twenty guests, mostly judges. There were no speeches, but a few very happy toasts. Wednesday night was set aside for the final banquet, at which Mr. Choate presided. A very intersting entertainment was the visit through the uncompleted Mt. Royal Tunnel, arranged in honor of the visiting judges and members by Mr. S. P. Brown, Chief Engineer. Mr. Brown is an American who, under the age of forty years, has become one of the leading tunnel experts of the world.

The reform of judicial procedure was easily the distinguishing feature of the meeting. The address of President Taft would have made it so apart from the permanent organization of the Conference of Judges. President Taft spoke on "The Selection and Life Tenure of Judges." He set up a precedent when he said that "when a judge was disliked by the Bar, it was largely his fault, because he has so much opportunity to cultivate their love and respect." He bitterly assailed the small salaries paid to judges which "forces the best judges to live meanly and think highly." He condemned the election of judges by the people. He has carefully watched the two classes of judges and unhesitatingly announces that the judge holding office by virtue of appointment is far superior with a few notable exceptions and these are instances of the adaptability of the American people and their genius for making the best out of bad methods and are not a vindication of the system. He spoke with emphasis "of the disgraceful exhibitions of men campaigning for the place of State's Supreme Judge and asking votes on the ground that their decisions have the particular class flavor." He condemned the present federal system of impeachment and recommended a removal of judges by a joint resolution of the House and Senate. He did not feel that the time was ripe to adopt a recent suggestion of a judicial court of inquiry made up of judges selected by the Chief Justice of the United States. He deplored the cause for criticism arising out of the appointment of receivers and recommended that some other course be adopted. He suggested that the power of appointment of clerks be taken away from federal judges and placed in the classified service subject to executive appointment. These were the features of his address.

Mr. Thomas W. Shelton in his address to the "Conference of Judges," again advocated a "fixed system of interstate judicial relations" just as there is a fixed system of interstate commercial relations.

BOOK REVIEWS.

PUBLIC SERVICE COMMISSION REPORTS, FIRST DISTRICT NEW YORK, VOLS. II, III.

In 75 Cent. L. J. 63, we reviewed at some length, Vol. I of this series of reports, and what we said as to the merit of the report as showing practical application of the public service commission law is here confirmed.

The opinions delivered generally are succinct and clear, with only such citation of authority and excerpts from opinions as are plainly in point, extensive argumentation being avoided. There is seen in these reports quite a commendable promptness in disposing of questions presented, a week to ten days sometimes passing between close of hearing and decision, and sometimes opinion being adopted on the day that a hearing closes, or on the following day. When deemed advisable, however, and important principles are to be ruled, longer time is taken. Thus in one important case we notice that hearings closed April 21, 1910, opinion adopted July 12, 1910.

The commission appears to be diligent to secure both care and expedition, and not only are opinions well writen, but elaborate syllabi are prepared regarding them.

The volumes are bound in law buckram and are published by the Commission, 1913.

HUMOR OF THE LAW.

Judge—"It seems to me that I have seen you before."

Prisoner—"You have, your honor; I taught your daughter singing lessons."

Judge—"Thirty years."—New York Evening World.

Some time in his second year he asked advice on a point of law, saying he did not agree with the law-school lecturer on the matter.

"Ask me tomorrow. I'm busy," said the lawyer.

"But please tell me where to look. It won't do me any good unless I have it today."

"Why not?"

The boy replied, "Well, you see, I lecture tonight, and the point comes up."

"Lecture where? To whom?"

"Why, to my class. I have thirty boys, and I'm delivering last year's law-school lectures to them at ten cents a head."

The lawyer looked up the point for his confrere, who is now a rising lawyers in a great city.

When this ex-newsboy and product of the streets and night schools was first employed, he could spell, write clear English, and parse, which is more than a good many high school graduates can do. He got his English in the old-fashioned way, through spelling, grammar and writing; but he could not have passed an entrance examination in "English," because he could not have told the plot of "Henry Esmond."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bailment**—Conversion.—Defendant, having custody of plaintiff's automobile only as keeper for plaintiff, by intrusting it to another without plaintiff's knowledge or consent, whereby it was destroyed, was guilty of conversion.—Geren v. Hollenbeck, Ore., 132 Pac. 1164.

2. **Bankruptcy**—Fiduciary Capacity.—Indebtedness of bankrupt for proceeds of fertilizers sold by him as plaintiff's agent, under a contract providing that the bankrupt should hold the same in trust, held not a debt created in a fiduciary capacity so as to be exempt from the operation of the bankrupt's discharge under Bankr. Act.—American Agricultural Chemical Co. v. Berry, Me., 87 Atl. 218.

3.——Judicial Seizure.—A bankrupt's trustee takes no greater title than the bankrupt, as the bankruptcy proceedings do not operate as a judicial seizure, conferring new rights on the bankrupt.—Coggan v. Ward, Mass., 102 N. E. 336.

4.——Mortgage.—One by buying property at the sale of a trustee in bankruptcy, subject to the lien of a mortgage thereon, does not assume payment of the mortgage debt, but becomes owner of the property subject to the incumbrance.—Kerman v. Leeper, Mo., 157 S. W. 984.

5. **Banks and Banking**—Indorser.—That the word "car" was omitted from the name of the payee, Northland Motor Car Company, in the indorsement on the back of a note, did not invalidate such indorsement.—First Nat. Bank v. McNairy, Minn., 142 N. W. 139.

6.——Stockholders' Liability.—In an action to enforce the individual liability of stockholders of an insolvent bank, it was no defense that the bank became insolvent through the negligence and misfeasance of its directors.—Van Tuyl v. Robin, 142 N. Y. Supp. 535.

7. **Bills and Notes**—Consideration.—Agreement by defendant to give promissory note in consideration that plaintiffs would dismiss bankruptcy proceedings against defendant's son and secure assignments to defendant of the creditors' claims held not subject to rescission for want of mutuality, where plaintiffs had dismissed the bankruptcy proceedings and substantially performed the contract.—Taylor v. Ewing, Wash., 132 Pac. 1009.

8.——Consideration.—Where a note was given for goods sold, the vendor to have title until the note was paid, or, in case of sale of the goods, to the proceeds, the contract providing that retention of title should not release the maker from payment of the note, and the goods were destroyed by fire before the note fell due, the consideration for the note did not thereby fail.—Kentucky Wagon Mfg. Co. v. Blanton-Curtis Mercantile Co., Ala., 62 So. 368.

9.——Notice.——Where a town treasurer had no power to indorse checks except for deposit, a trust company, receiving a check from a private depositor indorsed "Town of F., by John B. Lombard, Treasurer," held chargeable with knowledge of its infirmity, and to be answerable to the drawer of the check for the proceeds.—Franklin Savings Bank v. International Trust Co., Mass., 102 N. E. 363.

10.——Notice of Usury.—Under Negotiable Instruments Law, defining a holder in due course, an indorser of a note sued on, alleged to be void for usury, was entitled to prove that plaintiff, an indorsee, had knowledge of the usury when he became the holder of the note, and had participated therein.—Kass v. Blumberg, 142 N. Y. Supp. 544.

11. **Cancellation of Instruments**—Equity.—A party suing to rescind a contract can obtain relief only on equitable terms, and, where equity finds that a condition exists which renders it impossible to restore the parties substantially to their original position and that to rescind will result in injustice, a rescission will be denied.—Rafferty v. Heath, Va., 78 S. E. 641.

12. **Carriers of Goods**—Rates.—As the Interstate Commerce Act prohibits discrimination in rates, the payment and collection of a lesser rate upon an interstate shipment than the one contained in the published schedule is no defense to an action for the balance.—New York N. H. & H. R. Co. v. York & Whitney Co., Mass., 102 N. E. 366.

13. **Carriers of Passengers**—Gratuitous Passenger.—A gratuitous passenger is ordinarily entitled to the same degree of care as a passenger paying the regular fare.—Smith v. Northern Cent. Ry. Co., Md., 87 Atl. 259.

14.——Licensee.—Where a person who has boarded a train to assist a passenger, with the acquiescence of the carrier, is injured from the sudden starting of the train or the omission to give the customary signals, the carrier is liable.—St. Louis & S. F. R. Co. v. Lee, Okla., 132 Pac. 1070.

15.——Negligence.—Where plaintiff was

caused to board defendant's train by the negligence of a union station gateman and defendant's brakeman in omitting to examine her ticket, which called for another road, she was a passenger on defendant's train and entitled to the high decree of care which defendant was required to exercise toward passengers.—Wendt v. Berry, Tex., 157 S. W. 1115.

16. **Charities**—Charitable Purpose.—The saying of masses for the soul of a testator, his wife, and son, which was made a condition of a bequest in trust was a charitable purpose.—Burke v. Burke, Ill., 102 N. E. 293.

17.——Quo Warranto.—Proceedings to correct abuses in the management of a public charity, such as a cemetery association, may be instituted either by the Attorney General or by the parties in interest, but the Attorney General should generally be brought into the suit and, if he desires, be permitted to control that part of the proceedings affecting the public right.—Bliss v. Linden Cemetery Ass'n, N. J., 87 Atl. 224.

18. **Commerce**—Intoxicating Liquors. — The state has power to regulate the business of soliciting proposals to purchase intoxicating liquors by agents of foreign liquor dealers.—Martin v. Commonwealth, Ky., 157 S. W. 1078.

19.——State License.—The licensing of slaughter houses by state authority is within the police power, and a statute providing for the licensing of slaughter houses is not invalid as interfering with foreign commerce where the meat is intended only for export.—Board of Health of New Jersey v. Schwarz Bros. Co., N. J., 87 Atl. 147.

20.——State Regulation.—The state Legislature may enact statutes as to the weight in avoirdupois of potatoes, grains, and other articles commonly sold by dry measure; Congress not having legislated under its constitutional authority to fix the standard of weights and measures.—Commonwealth v. Gussman, Mass., 102 N. E. 342.

21. **Contracts**—Architect's Certificate. — Under a building contract providing for a final certificate by the engineer as a condition precedent to the right of payment, a certificate cannot properly be refused where the contractor has fully performed.—Central Union Stock Yards Co. v. Uvalde Asphalt Paving Co., N. J., 87 Atl. 235.

22.——Consideration.—An injury to one party or a benefit to another is a sufficient consideration for a promise.—Condon v. Exton-Hall Brokerage & Vessel Agency, 142 N. Y. Supp. 548.

23. **Corporations**—Equity.—A stockholder in a corporation has a remedy in equity against the directors to prevent acts amounting to a violation of the charter or to prevent any misapplication of the capital or profits which might lessen the value of the shares, if the acts would amount to a breach of trust or duty.—Skeen v. Warren Irr. Co., Utah, 132 Pac. 1162.

24.——Personal Liability.—Where a foreign corporation puts horses in charge of its president, with power to contract with reference thereto for the purpose of evading the corporation laws, the president becomes personally liable for the keep of the horses, even though the agister knew that they belonged to the corporation.—Von Cotzhausen v. Barker, Ky., 157 S. W. 1093.

25.——Subscription.—An accepted subscription to stock of a corporation already organized makes the subscriber a stockholder, and liable to calls for the full amount subscribed, but a contract to subscribe in the future does not make the obligor a subscriber.—Webb. v. Moeller, Conn., 87 Atl. 277.

26.——Subscription.—Where a corporation, having the stock and bonds of another corporation for subscription, offered the same for subscription among its own stockholders, and assented to a subscription by a stockholder partially for one not a stockholder, neither the corporation nor the subscriber could thereafter claim that the subscription to the extent of such nonstockholder's interest was a fraud on the corporation.—Bacon v. Grosse, Cal., 132 Pac. 1027.

27.——Voidable Contract.—A contract, made by a corporation through its board of directors with members of such board, concerning property of the corporation is not void, but is voidable at the election of the corporation promptly asserted, although enforceable obligations of the corporation may arise from the transaction, such as an obligation to repay money loaned.—Endicott v. Marvel, N. J., 87 Atl. 230.

28. **Courts**—Jurisdiction.—Jurisdiction of an equitable defense to certain notes sued on cannot be conferred on a court of law by waiver or consent of the parties—Standard Portland Cement Corporation v. Evans, C. C. A., 205 Fed. 1.

29. **Covenants**—Building Restriction. — One who violates a mutually restrictive building covenant cannot complain in equity of a similar violation by another.—Smith v. Spencer, N. J., 87 Atl. 158.

30. **Criminal Evidence**—Comparison of Writings.—A comparison may be instituted between an alleged forged paper and another paper shown to be genuine, if the latter is independently in evidence, but not between the alleged forged paper and extraneous paper.—King v. State, Ala., 62 So. 374.

31.——Circumstantial Evidence. — Accused, seeking to rebut the circumstantial evidence against himself, may show that a third person committed the defense and had a motive for committing it.—Davis v. State, Ala., 62 So. 382.

32.——Evidence.——Where, in a prosecution for burglary, defendant's chief defense was an alibi, a letter written by defendant while in jail asking the addressee to testify to save defendant that the addressee was with defendant on the date of the alleged burglary was admissible.—People v. Bird, Cal., 132 Pac. 1061.

33.——Insanity.—It is only insanity of a chronic or permanent nature which on being proved is presumed to continue; there being no presumption that fitful and exceptional attacks of insanity are continuous.—Cogbill v. State, Ala., 62 So. 406.

34.——Judicial Notice.—The court cannot take judicial notice that prohibition is in force in any country or subdivision thereof, and the personal knowledge of the presiding judge on a trial for selling liquor in prohibition territory is not judicial knowledge.—Jackson v. State, Tex., 157 S. W. 1196.

35. **Damages**—Breach of Contract.—The damages recoverable for breach of contract are such as will compensate for loss so far as the same was or ought to have been in the contemplation of the parties.—Pugh v. Jackson, Ky., 157 S. W. 1082.

36.——Earnings.—A husband, suing for a personal injury to his wife, may recover for loss of wages, earnings, or profits in his business, sustained in consequence of caring for the wife, but he must show the value of his time, the amount of his wages, or the amount of profits lost.—Esque v. United Rys. Co. of St. Louis, Mo., 157 S. W. 1061.

37. **Deeds**—Blank for Name.—Where one never legally obtained possession of a deed containing a blank for the grantee and never obtained authority from the grantor to insert his name as grantee, he acquired no right by obtaining possession of the deed and inserting his own name as grantee.—Beatty v. Shelly, Utah, 132 Pac. 1160.

38.——Repugnancy.—A clause in a deed providing that the grantee should have no power to sell, mortgage, or convey the land held not ineffective as repugnant to a granting clause not containing such condition.—Abbott v. Doyle, Kan., 132 Pac. 1177.

39.——Shelley's Case.—Where a deed conveyed land to a person for her natural life, with remainder to the heirs of her body and a limitation over in default of issue under the rule in Shelley's case, she took a fee-simple title absolutely in the land.—Peters v. Rice, Tex., 157 S. W. 1181.

40. **Divorce**—Bed and Board.—A divorce from bed and board cannot be had upon proof in a lessor degree than is necessary to entitle the petitioner to an absolute divorce, but as high a degree of proof must be given in one case as the other.—Macomber v. Macomber, R. I., 87 Atl. 170.

41.——Res Judicata.—A decree in a divorce suit precludes a re-examination of the same facts on the same charge in a subsequent case between the same parties.—Lee v. Lee, Okla., 132 Pac. 1070.

42.——Temporary Alimony.—The Supreme Court has power to allow temporary alimony pending appeal and to order payment of attorney's fees or suit money and to provide for the temporary custody of children until the determination of the appeal.—Kjellander v. Kjellander, Kan., 132 Pac. 1170.

43. **Eminent Domain**—Police Power.—In the exercise of the police power by a city, property which is a menace to public safety or health may be destroyed without compensation, when necessary to protect the public, but the public necessity is the limit of the right.—Poisgrove v. Moss, Ky., 157 S. W. 1133.

44. **Evidence**—Photographs. — Photographs of the location of the alleged accident are not necessarily to be excluded, because the situation is capable of verbal description.—Zancanella v. Omaha & C. B. St. R. Co., Nebr., 142 N. W. 190.

45.——Res Gestae.—Spontaneous exclamations are admissible in evidence as a part of the occurrence, even though not simultaneous or coincident with the main fact, if they are so clearly connected therewith as to form a continuous transaction.—Grant v. Kansas City Southern Ry. Co., Mo., 157 S. W. 1016.

46.——Unfair Inference.—Failure of a party to introduce competent witnesses equally accessible to both party raises no unfavorable inference.—Fulson-Morris Coal & Mining Co. v. Mitchell, Okla., 132 Pac. 1103.

47.——Unfair Inference.—That a party called only one of three witnesses who had an equal knowledge of a fact sought to be established does not authorize an inference that the other witnesses would have testified differently.—Citizens' Nat. Life Ins. Co. v. Ragan, Ga., 78 S. E. 683.

48. **Fixtures**—Removal.—A lessee who installs fixtures or makes additions to those in the leased building for the purpose of adapting it to the purpose for which both parties understand it is to be used is generally permitted to remove them, unless their removal would materially injure the freehold or the fixtures.—Webb v. New Haven Theater Co., Conn., 87 Atl. 274.

49. **Fraud**—False Representations.—One who represents as true what he knows to be false in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on and is acted on, it constitutes a fraud which will sustain an action for deceit at law or a bill for rescission.—Jordan v. Walker, 78 S. E. 643.

50. **Fraudulent Conveyances**—Burden of Proof.—A judgment creditor seeking to set aside a conveyance as fraudulent has the burden of proving that the conveyance was made without consideration, or executed by the grantor with a fraudulent intent, and that the grantee knew of the intent, and participated herein.—Tyner v. Johnson, Md., 87 Atl. 266.

51.——Burden of Proof.—If a deed between near relatives is assailed as being executed to defraud creditors, the burden is on the grantee to prove that the transfer was without notice of the fraud.—United States Nat. Bank of Vale v. Thebaud, Ore., 132 Pac. 1168.

52.——Insolvency.—An assignee in insolvency can sue in equity to set aside a fraudulent conveyance of the assignor, even though he might recover possession by an action at law; it being his duty to dispose of the property to the best advantage, which can only be done where he can offer the purchasers a clear title, as he could not if he merely recovered possession in ejectment and trespass.—Lace v. Smith, R. I., 87 Atl. 212.

53.——Homestead.—The sale of a homestead cannot be a fraud upon creditors, since it is not subject to sale to pay debts.—Baker v. Estridge, Ky., 157 S. W. 1080.

54. **Frauds, Statute of**—Equity.—While the statute of frauds applies to suits in equity as well as actions at law, courts of equity will deprive defendants of its protection where it would perpetrate a fraud.—Wirtz v. Guthrie, N. J., 87 Atl. 134.

55.——Performance Within Year.—The question is not whether a contract would have actually been performed within a year, but whether it could be performed within that time.—Owensboro Shovel & Tool Co. v. Moore, Ky., 157 S. W. 1121.

56. **Garnishment**—Wages.—Right of a bartender against his employer to his compensation of $15 per week payable out of the amount taken in by the business held a debt subject to garnishment as such.—Jenkins v. Leader, Ala., 62 So. 370.

57. **Guardian and Ward**—Collateral Attack. —The jurisdictional act of a probate court in appointing a guardian for a minor is binding on the minor and not open to collateral attack.—Brack v. Morris, Kan., 132 Pac. 1185.

58. **Habeas Corpus**—Parent and Child.—A parent who is a suitable person is entitled to the custody of his child as a matter of right against any one not its parent, whether it might be better provided for by some one else or not.—Ex parte Hollinger, Kan., 132 Pac. 1181.

59. **Homicide**—Advice of Counsel.—That defendant acted upon the advice of counsel in taking forcible possession of a factory at the cost of human life constituted no defense in his trial for the homicide.—State v. Orraye, N. J., 87 Atl. 121.

60.——Dying Declaration.—Dying declarations made when death was certain and when deceased so believed held admissible, although made 30 and 36 hours before his death.—Daniel v. Commonwealth, Ky., 157 S. W. 1127.

61.——Mutual Combat.—Where two persons enter willingly into a difficulty, each to gratify his passions by inflicting injury on the other, neither may rely on self-defense, but either is guilty of murder if he kills his adversary.—Perry v. State, Ala., 62 So. 392.

62. **Husband and Wife**—Enabling Act.—Notwithstanding the married woman's statute, a wife owes domestic services to her husband; and, where she sustains a personal injury through the negligence of another, she cannot recover for loss of time relating to her domestic duties.—Stout v. Kansas City Terminal Ry. Co., Mo., 157 S. W. 1019.

63.——Equity.—That a husband cannot recover for improvements voluntarily made on his wife's property does not prevent the court

from granting such relief when necessary to adjust the rights of the parties in a suit by a wife to set aside a conveyance of her separate property to her husband.—Fay v. Fay, C., 132 Pac. 1040.

64. **Indictment and Information**—Alias.—Where an indictment designated accused with an alias, "whose name to the grand jury is otherwise unknown," it could be shown under the plea of not guilty that the grand jury had knowledge of facts as to his true name.—Robinson v. State, Ala., 62 So. 372.

65. **Insurance**—Broker.—A broker employed to secure insurance is the agent for the insured, and not for the company.—Condon v. Exton-Hall Brokerage & Vessel Agency, 142 N. Y. Supp. 548.

66.——Concurrent.—Where defendant's policy permitted other concurrent insurance without limitation, it was not avoided by reason of the fact that plaintiff secured Lloyd's insurance and a marine policy covering the same property, insuring against the same casualty and during the same period, but not subject to the identical liability.—Globe & Rutgers Fire Ins. Co. v. Alaska-Portland Packers' Ass'n., C. C. A., 205 Fed. 32.

67.——Forfeiture.—A life policy containing nonforfeiture provisions, being the work of the insurer, will be construed most strictly against it and in favor of the insured, in order to prevent a forfeiture.—Stratton's Admin'r v. New York Life Ins. Co., Va., 78 S. E. 636.

68.——Forfeiture.—Stipulations in an assessment life insurance contract that insured, failing to pay dues and assessments by the last of each month, shall stand suspended, and that one in suspension less than 60 days may be reinstated by filing a health certificate and paying delinquent dues and assessments, are valid and, where insured made no effort to procure his reinstatement on the refusal of a local correspondent to receive dues and assessments after maturity, he must be deemed to have abandoned the policy as properly forfeited.—Easter v. Brotherhood of American Yeoman, Mo., 157 S. W. 992.

69.——Release.—The waiver by an insurance company of a provision of a policy that action shall not be commenced thereon within three months after the furnishing of proof of loss did not constitute a sufficient consideration to support a release executed before the expiration of such three months, discharging the insurance company on its payment of less than the face value of the policy.—Harms v. Fidelity & Casualty Co. of New York, Mo., 157 S. W. 1046.

70.——Suicide.—The presumption against suicide, which is a crime involving a high degree of moral turpitude, stands as a presumption of fact until overthrown by evidence.—Bohaker v. Travelers' Ins. Co. of Hartford, Conn., Mass., 102 N. E. 342.

71. **Landlord and Tenant**—Abandonment.—Where a lessee entered into possession of premises which were unfinished, relying upon the lessor's promise to immediately finish them, the fact that they were not ready for occupancy, according to the terms of the lease, cannot be set up to defeat an action for rent accruing during the lessee's occupancy, but it may be set up to defeat an action for rent accruing after the lessee's abandonment because of the unfinished state of the demised property.—Morse v. Tochterman, Cal., 132 Pac. 1055.

72.——Lease.—Though no particular words are necessary to create a lease, an intention of one party to divest himself of possession and of the adverse party to come into possession for a determinate time must appear.—Ettinger v. Christian Schruck & Co., 142 N. Y. Supp. 481.

73.——Re-entry.—Where a lessor re-enters and declares a forfeiture for the lessee's failure to pay rent, the rent then fully accrued is collectible, but rent which has not fully accrued is not recoverable.—Sharon v. American Fidelity Co., Mo., 157 S. W. 972.

74.——Waiver.—Where the lessor, by failing to object to the subleasing, waived a condition of the lease prohibiting the subleasing of the premises, his successor in title was bound thereby.—Devlin v. Le Tourneau, Minn., 142 N. W. 155.

75. **Libel and Slander**—Judicial Proceedings.—Though fair reports of judicial proceedings and debates in legislative bodies are absolutely privileged, reports of public officials are not of such a character that they may be published in newspapers without rendering the newspaper liable for damages in case the statements in the reports are false.—Schwarz Bros. Co. v. Evening News Pub. Co., N. J., 87 Atl. 148.

76.——Judicial Proceedings. — Defamatory statements made in judicial proceedings must be pertinent and material to the case in order to be privileged.—Dodge v. Gilman, Minn., 142 N. W. 147.

77.——Privilege.—A libelous publication must purport to be a report of a public official proceeding or something said in the course thereof, in order to be privileged on that ground.—Lewis v. Hayes, Cal., 132 Pac. 1022.

78. **Life Estates**—Power of Sale.—Where life tenant was given power of sale, if necessary to supply herself with the comforts and necessities of life, any alienation without reference to the condition imposed would be restrained.—Burke v. Burke, Ill., 102 N E. 293.

79. **Limitation of Actions**—Cestui Que Trust.—The statute of limitations can never run as between the cestui que trust and the trustee, and while in general this rule holds good only as between the cestui que trust and the trustee, and not between the cestui que trust and the trustee on one side and strangers on the other, yet the statute does not run between a cestui que trust and a trustee ex maleficio.—Canada v. Daniel, Mo., 157 S. W. 1032.

80. **Master and Servant**—Assumption of Risk.—Where a dangerous condition in an employer's shop arose subsequent to an employe's employment, there was no contractual assumption by him of the risk of injury therefrom.—Perry v. Davis & Sargent Lumber Co., Mass., 102 N. E. 320.

81.——Assumption of Risk.—A master has no right to enhance the natural risks of the business by compelling his servant to use proper instrumentalities in a negligent or unnecessarily dangerous manner.—Timmerman v. Frankel, Mo., 157 S. W. 1051.

82.——Exoneration.—To obtain the exoneration from liability, conferred by the statute requiring operators of coal mines to employ mine foremen, the operators must comply strictly with the conditions of the act.—Gartin v. Draper Coal & Coke Co., W. Va., 78 S. E. 673.

83.——Fellow Servant.—Where an employe struck by a board thrown back by a circular saw was injured through the negligence of a coemploye, operating the saw, in failing to properly control the board, the employer was not liable.—Haas v. American Car & Foundry Co., Mo., 157 S. W. 1036.

84.——Guarding Machinery.—In an action for injuries to an employe for failure to guard a machine, evidence that another had previously been injured on the machine, was admissible solely for the purpose of showing that the machine was dangerous to those working about it; that being an issue.—Miniea v. St. Louis Cooperage Co., Mo., 157 S. W. 1006.

85.——Independent Contractor.—One who was paid by the piece for the work done in his room and hired and discharged his own employes at his pleasure, fixed and paid their compensation and directed their work, defendant having no control over or direct relation with such employees, was an independent contractor, so that defendant was not liable to such person's employes as an employer.—Merron v. Fessenden & Lowell, N. H., 87 Atl. 248.

86.——Obvious Danger.—Mere knowledge on the part of the servant of the danger in using a defective instrument or appliance will not preclude his recovery, unless the danger is so obvious and imminent that a man of ordinary prudence would, under the circumstances, refuse to continue to work with the instrumentality in question.—Bliesner v. G. Riesmeyer Distilling Co., Mo., 157 S. W. 980.

87.——Warning Servant.—Where a railroad company had a fireman run upon a wider type of engine than was customarily used, held, that it was negligent in failing to warn him of the danger in keeping a lookout from the gangway of the cab.—Cate v. Boston & M. R. R., N. H., 87 Atl. 255.

88. **Mortgages**—Duress.—Threat of lawful arrest for an offense actually committed is not sufficient ground for the cancellation of a mortgage executed as a result thereof to secure the maker of the threat from loss occasioned by the crime.—Englert v. Dale, N. D., 142 N. W. 169.

89. **Municipal Corporations**—Coal Hole.—Where a pedestrian is injured from a fall, due to slipping on a defective coalhole cover, long maintained in the sidewalk by a property owner, both the city and the property owner may be held liable, though neither has had actual notice of the defect.—Latell v. Cunningham, Minn., 142 N. W. 141.

90. **Navigable Waters**—Change of Channel.—The changing of the main channel in the St. Louis river, where it forms the boundary between Wisconsin and Minnesota, by the government in improving navigation, so as to leave an island previously on the Wisconsin side of the channel on the other side, held not to deprive the Wisconsin owner of the island of his title thereto.—Whiteside v. Norton, C. C. A., 205 Fed. 5.

91. **Nuisance**—Abatement. — An ordinance prohibiting occupation of dwellings unfit for habitation, providing for notice to the owner to render the dwelling habitable, and authorizing judgment to remove the building on the owner's failure to remedy the defect, requires judicial procedure for the abatement a dwelling unfit for habitation, and does not authorize the city officers to destroy it.—Polsgrove v. Moss, Ky., 157 S. W. 1133.

92.——Statutory Permission.—Where the doings of a thing which would otherwise be a public nuisance is authorized by statute, the doing of that thing by the person so authorized as authorized cannot constitute a public nuisance, in the absence of negligence other than the mere doing of the authorized act.—State v. Erie R. Co., N. J., 87 Atl. 141.

93. **Partnership**—Trust.—Persons associating themselves together to carry on business for their mutual profit create a partnership, though their shares are represented by transferable certificates, and though the legal title to the property is taken in the name of a third person as agent; but where there is no association between the certificate holders, and the property is the property of the trustees, who manage the same, the certificate holders are not partners.—Williams v. Inhabitants of Milton, Mass., 102 N. E. 355.

94. **Physicians and Surgeons**—Action.—An action against a physician to recover for negligent and unskillful treatment is based on a breach of contract to treat plaintiff with ordinary professional skill, and is not an action of tort.—Finch v. Bursheim, Minn., 142 N. W. 143.

95. **Principal and Surety**—Building Contract.—A surety upon the bond of a building contractor is not discharged because of alterations in the building, where it consented to all of the alterations which were done upon the written order of the architect, and for which the owner was liable; the fact of unauthorized alterations and additions not affecting liability.—Wiley v. Hart, Wash., 132 Pac. 1015.

96.——Release.—Where within the time allowed for performance of a contract by a party thereto the adverse party makes performance impossible, the surety on the bond of the party conditioned on performance is not liable.—Sharon v. American Fidelity Co., Mo., 157 S. W. 972.

97. **Rape**—Attempt.—There may be a conviction for attempt to rape, though present ability to do the act is not shown, if there is such apparent ability to do it as to cause prosecutrix reason to fear the injury, unless she retreat to secure her safety.—Burton v. State Ala., 62. So. 394.

98. **Sales**—Approval.—A sale on approval gives to the buyer the privilege of returning all or any part of the goods after receiving and inspecting them.—J. T. McTeer Clothing Co. v. T. L. Farrow Mercantile Co., Ala., 62 So. 378.

99.——Cost.—That mules sold for cash were delivered to the buyer's tenants in anticipation of prompt payment did not constitute a waiver of the seller's right to recede from the agreement upon the owner's failure to make payment.—Centreville Bank v. Boudreaux, La., 62 So. 412.

100.——Elements of.—Where a customer picks up an article the price of which he knows, hands the proprietor or a clerk the price thereof, which is received, and departs with the article, the transaction constitutes a "sale."—Peeters v. State, Wis., 142 N. W. 181.

101.——Passing of Title.—Where the goods sold are sufficiently designated, it is not absolutely necessary to the passing of title that they should be in a deliverable condition, or that the quality or quantity should be determined.—Lynch v. Merrill, W. Va., 78 S. E. 669.

102.——Recoupment.—Where a vendee sued for the price recoups for damages for breach of warranty, he need not tender return of the goods.—B. F. Roden Grocery Co. v. iGpson, Ala., 62 So. 388.

103.——Refusal to Deliver.—The buyer, upon failure to receive coal purchased, could buy the coal at the market price in the nearest market and recover from the seller the difference between the contract price, and market price.—J. J. Moore & Co. v. J. S. Guerin & Co., Cal. 132 Pac. 1038.

104.——Sample.—A buyer in a contract of sale by sample with warranty that the goods shall correspond with the sample, who accepts the goods after opportunity for inspection, is not theeeby prevented from recovering damages for breach of the warranty, though the retention and use of he goods without any complaint warrants a strong inference that they comply with the contract.—Jacot v. Grossman Seed & Supply Co., Va., 78 S. E. 646.

105. **Sunday**—Ratification.—Where the original sale contract was void because made on Sunday, the subsequent delivery and retention of the goods sold was a sufficient consideration for a new express contract to pay for same.—Rosenblum v. Schachner, N. J., 87 Atl. 99.

106. **Trusts**—Active.—Where the duties imposed by a will are active and render the possession of the estate reasonably necessary, the executors will be deemed trustees for the performance of their duties, to the same extent as though declared to be so by the most explicit language.—In re Fritsch, 142 N. Y., Supp. 555.

107.——A legatee under a testamentary trust, who received from the trustee moneys to which she was not entitled under circumstances charging her with full notice of their trust character, and in express violation of the terms of the trust, as to such moneys becomes a trustee ex maleafico and liable to the party rightfully entitled thereto.—Canada v. Daniel, Mo., 157 S. W. 1032.

108. **Waste**—Contingent Remainder.—A contingent remainderman may not maintain an action for waste, although he is entitled to have ris contingent interest protected in equity, by injunction to prevent future waste.—Canada v. Daniel, Mo., 157 S. W. 1032.

109. **Wills**—Estate Tail.—Under a will bequeathing the residue of testator's estate to her daughter for life and then to her children, if any, and providing that, if there should be no children of hers or any heirs from any of her children, the estate should go to other devisees, the daughter took an estate tail, which was converted into a fee by Act April 27, 1855.—Gilland v. Hallett, Pa., 87 Atl. 303.

110.——Latent Authority.—A corporation which was carrying on a school, known by a particular name different from the name of the corporation, and which was the only school of that name in the state, is entitled to receive a legacy bequeathed in the school name where it appears that the testatrix had contributed to the corporation under the school name in her lifetime.—Holloway v. Institute of Mission Helpers of Baltimore City, Md., 87 Atl. 269.